APPENDIX A

1. Has BellSouth met the requirements of section 271(c)(1)(A) of the Telecommunications Act of 1996?

(1). Has BellSouth met the requirements of section 271(c)(1)(B) of the Telecommunications Act of 1996?

2. Has BellSouth provided interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of the Telecommunications Act of 1996, pursuant to 271(c)(2)(B)(i) and applicable rules promulgated by the FCC?

3. Has BellSouth provided nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of the Telecommunications Act of 1996, pursuant to 271(c)(2)(B)(ii) and applicable rules promulgated by the FCC?

4. Has BellSouth provided nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by BellSouth at just and reasonable rates in accordance with the requirements of section 224 of the Communications Act of 1934 as amended by the Telecommunications Act of 1996, pursuant to 271(c)(2)(B)(iii) and applicable rules promulgated by the FCC??

5. Has BellSouth unbundled the local loop transmission between the central office and the customer's premises from local switching or other services, pursuant to section 271(c)(2)(B)(iv) and applicable rules promulgated by the FCC?

6. Has BellSouth unbundled the local transport on the trunk side of a wireline local exchange carrier switch from switching or other services, pursuant to section 271(c)(2)(B)(v) and applicable rules promulgated by the FCC?

7. Has BellSouth provided unbundled local switching from transport, local loop transmission, or other services, pursuant to section 271(c)(2)(B)(vi) and applicable rules promulgated by the FCC?

8. Has BellSouth provided nondiscriminatory access to the following, pursuant to section 271(c)(2)(B)(vii) and applicable rules promulgated by the FCC:

   (a) 911 and E911 services;
   (b) directory assistance services to allow the other telecommunications carrier's customers to obtain telephone numbers; and,
   (c) operator call completion services?

9. Has BellSouth provided white pages directory listings for customers of other telecommunications carrier's telephone exchange service, pursuant to section 271(c)(2)(B)(viii) and applicable rules promulgated by the FCC?

10. Has BellSouth provided nondiscriminatory access to telephone numbers for assignment to the other telecommunications carrier's telephone exchange service customers, pursuant to section 271(c)(2)(B)(ix) and applicable rules promulgated by the FCC?

11. Has BellSouth provided nondiscriminatory access to databases and associated signaling necessary for call routing and completion, pursuant to section 271(c)(2)(B)(x) and applicable rules promulgated by the FCC?

12. Has BellSouth provided number portability, pursuant to section 271(c)(2)(B)(xi) and applicable rules promulgated by the FCC?

13. Has BellSouth provided nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) of the Telecommunications Act of 1996, pursuant to section 271(c)(2)(B)(xii) and applicable rules promulgated by the FCC?

14. Has BellSouth provided reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of the Telecommunications Act of 1996, pursuant to section 271(c)(2)(B)(xiii) and applicable rules promulgated by the FCC?

15. Has BellSouth provided telecommunications services available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of the

Telecommunications Act of 1996, pursuant to section 271(c)(2)(B)(xiv) and applicable rules promulgated by the FCC?

16. By what date does BellSouth propose to provide interLATA toll dialing parity throughout Florida pursuant to section 271(e)(2)(A) of the Telecommunications Act of 1996.

17. If the answer to issues 2-15 is "yes", have those requirements been met in a single agreement or through a combination of agreements?

18. Should this docket be closed?

BEFORE THE CORPORATION COMMISSION OF THE
STATE OF OKLAHOMA

Application of Ernest G. Johnson, Director of the Public Utility Division Oklahoma Corporation Commission to Explore the Requirements of Section 271 of the Telecommunications Act of 1996	))))))	) Cause No. PUD 9700000064

SPRINT'S LEGAL MEMORANDUM RELATIVE TO THE APPLICATION BY SBC COMMUNICATIONS, INC., SOUTHWESTERN BELL TELEPHONE COMPANY, AND SOUTHWESTERN BELL LONG DISTANCE FOR PROVISION OF IN-REGION, INTERLATA SERVICES IN OKLAHOMA

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BEFORE THE CORPORATION COMMISSION OF THE
STATE OF OKLAHOMA

Application of Ernest G. Johnson, Director of the Public Utility Division Oklahoma Corporation Commission to Explore the Requirements of Section 271 of the Telecommunications Act of 1996	) Cause No. PUD 9700000064

SPRINT'S LEGAL MEMORANDUM

Sprint Communications Company L.P. (Sprint) respectfully submits this legal memorandum in response to the Brief in Support of Application by SBC Communications, Inc., Southwestern Bell Telephone Company ad Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Oklahoma. This legal memorandum addresses the statutory interpretation of issues relating to Southwestern Bell Telephone Company's (SWBT) compliance with the provisions of Section 271 of the Telecommunications Act of 1996 (Act).[1]

It is Sprint's opinion supported by arguments set out more fully below, that SWBT must demonstrate compliance with Section 271 through the Track A provision and that SWBT's provisions of interLATA services in Oklahoma would be contrary to the public interest.

Sprint respectfully requests that this Commission remain mindful that the purpose of the checklist and the other requirements of Section 271 is to ensure that before SWBT

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[1] Telecommunications Act of 1996, Pub. O. No. 104-1-4, 110 Stat. 56 (1996 Act), to be codified at 47 U.S.C. §§ 151 et seq. Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it will be codified in the United States Code. The 1996 Act amended the Communications Act of 1934.

enters the in-region interLATA market, it has opened its local exchange market to meaningful competition such that competitive providers of local services are offering consumers real choices. Sprint submits that it would be a mistake for this Commission to find that SWBT has complied with Section 271 until the local service markets are demonstrably open to competition.

I. LEGAL ARGUMENTS RELATING TO SWBT's COMPLIANCE WITH PROVISIONS OF SECTION 271(C)(1) OF THE TELECOMMUNICATIONS ACT OF 1996

A. The Requirements of Section 271(c)

Section 271(c) of the FTA sets forth the procedures through which SWBT may apply to the Federal Communications Commission (FCC) for authorization to provide interLATA services in Ohio. To enter the interLATA market, Section 271(c) requires that SWBT satisfy criteria under three broad, but interrelated categories. In brief, a showing must be made that SWBT:

(1) has entered into an approved interconnection agreement with at least one unaffiliated competing provider of facilities-based telephone exchange service (serving both business and residential customers) to provide access and interconnection to SWBT's network facilities (unless no competitor has requested access and interconnection, SWBT is offering such services in accordance with a statement of generally available terms;

(2) is providing access and interconnection pursuant to one or more access/interconnection agreements (or, if there is no such agreement, SWBT Ohio generally offers to provide access and interconnection in accordance with a statement of generally available terms); and

(3) has satisfied the requirements of the 14-point competitive checklist set forth in Section 271(c)(2)(B).[2]

The FCC is required to issue a written determination approving or denying SWBT's requested authorization "[not] later than 90 days after receiving" SWBT's application for in-region interLATA service.[3] Before making any determination, however, the FCC must consult with the U.S. Attorney General and the relevant state commission.[4] The U. S. Attorney General is required to provide the FCC with "an evaluation of the application using any standard the Attorney General considers appropriate.[5] The purpose of the FCC's consultation with the state commission is "to verify the compliance of the Bell operating company with the requirements of [271(c)].[6]

After consultation with the Department of Justice (DOJ) and this Commission, the FCC "shall not approve the authorization requested" unless it finds that:

(1) the requirements of Section 271(X)(1) are met and either (a) SWBT has fully implemented the competitive checklist requirements of Section 271(c)(2)(B) or (b) SWBT's operating statement, if applicable, offers all of the items included in the competitive checklist;

(2) the requested authorization will be carried out in accordance with the "Separate Affiliate" and "Safeguards" requirements of FTA Section 272; and

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[2] 47 U.SC. §§ 271(c)(1)(A) and (c)(2)(B).

[3] 47 U.S.C. §271(d)(3).

[4] 47 U.S.C. §271(d)(2).

[5] 47 U.S.C. §271(d)(2)(A).

[6] 47 U.S.C. §271(d)(2)(B).

(3) the FCC finds that "the requested authorization is consistent with the public interest, convenience and necessity.[7]

B. The Requirements of Section 271(c)(1)(A) and 271(c)(1)(B) (The Track A/Track B Provisions)

Sprint respectfully submits that this Commission keep in the forefront of its consideration the sound policy objectives of the requirement for checklist compliance: that interconnection and access be available, on a non-discriminatory basis, to a variety of competing firms which will, in all likelihood, access and interconnect with the ILECs network in a variety of ways. One size does not fit all.

Whether Track A compliance with Section 271(c)(2)(B) may be achieved in a single agreement or multiple interconnection agreements is therefore inextricably tied to the practical realities of the interconnection arrangements actually available. One agreement that purports to meet each item of the checklist may not be sufficient if it in fact fails to provide, on reasonable and nondiscriminatory terms, certain items that had been irrelevant to one type of competitor but crucial to another. By the same reasoning, multiple agreements must not be allowed to become the anti-competitive tool of the ILEC, who could use multiple agreements to segment its competitors and mask discriminatory treatment contrary to the statutory requirements.

One key determinant here will be the rigor with which the Commission enforces the "most favored nation" obligation of SWBT as set forth in Section 252(i). Section 252(i) requires LECs to make available "any interconnection, service or network element"

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[7] 47 U.S.C. §271(d)(3)(C).

provided under an interconnection agreement to which it is a party "to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." The most favored nation provision thus establishes the central mechanism for enforcing the requirement that access and interconnection services on the checklist be truly available and provided in a nondiscriminatory manner.[3]

The roles of the Track A Section 271(c)(2)(B) requirements and the MFN Section 252(i) obligation are thus complementary. Compliance with Section 271(c)(2)(B) pursuant to Track A requires that the incumbent is actually providing all of the checklist items pursuant to "one or more" interconnection agreements. Compliance with Section 252(i) requires that each term of those agreements be available to any requesting carrier on the same basis. The combination yields confidence that additional competitors are also able to enter and expand by utilizing the existing agreements.

As the FCC recognized in its First Report and Order implementing Sections 251 and 252 of the Communications Act, this scheme will work only if third parties can obtain access to any individual interconnection, service or network element arrangements contained in an approved interconnection agreement.[9] Indeed, the more disaggregated the approach to MFN, the more effectively it will work to prevent discrimination and lower

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[8] See 47 U.S.C. § 271(c)(2)(B)(ii), (iii), (vii), (ix), (x), (xii). In addition, incumbents are required to provide interconnection, access to unbundled elements and the other services mandated by Section 251(c) on a nondiscriminatory basis. See generally 47 U.S.C. § 252(c).

[9] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98, 95-185 at ¶ 1310 (released August 8, 1996) ("FCC Interconnection Order").

the barriers to local entry. This is because each new entrant will likely require a different combination of checklist services for entry. Moreover, bundled offerings by the incumbent LEC may be in reality discrimination schemes in contravention of the statute. Thus, MFN should be implemented to allow competitors to pick and choose specific aspects of existing interconnection agreements to essentially create their own agreements.

Moreover, as the FCC acknowledged in its Section 251-252 First Report and Order, permitting carriers access only to entire agreements or only to large pieces of the agreement creates perverse incentives for the incumbent. For example, under such an arrangement, SWBT would have the incentive to try to make each agreement unattractive to third parties by including onerous terms and conditions for a service that the other contracting party does not need. In essence, this practice would enable the incumbent to discriminate among competitive carriers in violation of the statute by ensuring that only an actual party to an agreement receives the benefits of that agreement.

Of course, the Eighth Circuit's stay pending appeal of the FCC's MFN rules has left the status of that provision uncertain just at the time when new entrants are planning their entry strategies and negotiating interconnection agreements.[10] That process will therefore be much more successful in Oklahoma if the Commission independently adopts the FCC's MFN rules for the purposes of interconnection agreements within the state. Sprint respectfully urges the Commission to do so.

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[10] See Iowa Utils. Bd. v FCC, No. 96-3321 (8th Cir. Oct. 15, 1996).

Clearly, SWBt cannot satisfy Section 271(c)(2)(B) by combining interconnection agreements with a statement of generally available terms. Section 271(c)(2)(B) contains two entirely independent means of compliance.

The provision states as follows:

> Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following . . .[11]

As used in this subparagraph, the term "provided" matches the phrase "is providing" in Sections 271(c)(1)(A) and (c)(2)(A)(i)(I) as well as the term "provided" used in Section 271(d)(3)(A)(i). All of these provisions refer to compliance with Track A. As used in Section 271(c)(2)(B), the phrase "generally offered" matches the use of "generally offers" in Section 271(c)(1)(B), "is generally offering" in Section 271(c)(2)(A)(i)(II) and "generally offered" in Section 271(d)(3)(A)(ii). All of these provisions refer to compliance with Track B. Thus, as stated in Section 271(c)(2)(B), access and interconnection "provided" refers to Track A while the access and interconnection "generally offered" refers to Track B.

The use of the disjunctive "or" in Section 271(c)(2)(B) demonstrates that a carrier must either comply with the competitive checklist contained in that subparagraph exclusively through Track A or exclusively through Track B. As the Supreme Court has

[11] 47 U.S.C. § 271(c)(2)(B).

held, "canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meaning, unless the context dictates otherwise."[12]

Far from dictating some other interpretation of the term "or" in Section 271(c)(2)(B), the "context" of Section 271 only reinforces the view that Tracks A and B cannot be used in combination. Every place the two Tracks are mentioned in Section 271, they are stated in the disjunctive. For example, Section 271(c)(1) states that a BOC meets the requirements of that paragraph "if it meets the requirements of subparagraph (A) [Track A] or subparagraph (B) [Track B]" (emphasis added). Section 271(c)(2)(A) similarly states that a BOC meets the requirements of that paragraph if, within the state for which the authorization is sought, the company complies with Section 271(c)(1)(A) or Section 271(c)(1)(B). Section 271(c)(2)(B) restates these options in the disjunctive again.

Finally, Section 271(d)(3)(A) requires that SWBT has either "fully implemented" the competitive checklist pursuant to Track A or "offers all of the items included in the competitive checklist in subsection (c)(2)(B)" (emphasis added) pursuant to a Track B statement of generally available terms and conditions. Section 271(d)(3)(A) again unmistakably shows that the competitive checklist must be fulfilled either entirely pursuant to one or more Track A interconnection agreement or entirely pursuant to a Track B general statement.

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[12] Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979).

1. Because Numerous Telecommunications Providers Requested Interconnection from SWBT Within the Statutory Time Frame, SWBT Can Only Comply with Section 271(c) Through Track A

As explained above, Section 271(c)(2)(B) provides two independent means of compliance: one for Track A and one for Track B. In order to satisfy Section 271(c)(2)(B) under Track A, SWBT must provide all of the checklist elements in a fully functional manner.

The requirements for competitive checklist compliance pursuant to Track B, on the other hand, are less onerous. As mentioned, Section 271(c)(2)(B) only requires that SWBT generally offer all of the checklist items pursuant to a statement of generally available terms and conditions.

It should be pointed out, however, that SWBT is ineligible for Track B. Section 271(c)(1)(B) states that an incumbent may pursue this route only if, within 10 months of passage of the 1996 Act, "no such provider has requested access and interconnection described in subparagraph A." The "such provider" refers back to the "unaffiliated competing providers of telephone exchange service" mentioned in subparagraph A. Thus, once the incumbent receives a request for access or interconnection from any unaffiliated competitor, the incumbent must comply with the requirements of Track A, and Track B is rendered irrelevant unless one of the two exceptions in Track B is met.[13] Because it has already received such requests from numerous carriers, including Sprint, SWBT must pursue Track A.

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[13] See 47 U.S.C. § 271(c)(1)(B)(i), (ii).

There is one further aspect to the interplay between the two Tracks. The language of Section 271(c)(1)(A) makes it clear that, as mentioned, a request from any carrier for access or interconnection will trigger this path. It is therefore not necessary that the requesting carrier be predominantly facilities-based. This is because subparagraph (A) specifically states that "[f]or the purposes of this subparagraph, such telephone exchange service may be offered by such competing providers" either exclusively or predominantly over their own facilities. The limited application of the facilities-based language to subparagraph A shows that the term "such provider" which appears in a different subparagraph, Section 271(c)(1)(B), cannot mean a predominantly facilities-based provider.

Thus, because it has received interconnection requests from competitive carriers in Oklahoma within the statutory timeframe, Track B is unavailable to SWBT. SWBT must therefore provide all of the checklist services in a fully functional manner in order to meet the requirements of Section 271(c)(2)(B).

C. Definition of "Facilities-Based" Competition Pursuant to Section 271(c)(1)(A).

The central characteristic of facilities-based competitors is their freedom from reliance on the incumbent LEC's facilities. Thus, in order to meet the requirements of Section 271(c)(1)(A), there must be one or more competitors with sufficient market presence, in the form of their own facilities, to provide both local business and residential

subscribers a meaningful alternative to SWBT.[14] Such carriers must own their own facilities; it is also particularly important that such carriers own significant local loop facilities. The mere leasing of local loop elements from SWBT would simply continue the current dependence upon SWBT and is therefore insufficient.

Other factors such as the size of the competitors, the scope of their offerings, the percentage of consumers who subscribe to those offerings and the percentage of consumers to whom the services are available are all important considerations in the Section 271(c) analysis. But Congress did not intend that the test should turn on any specific quantitative measure of the competitive LECs' market presence. Rather, regulators should examine more generally whether the presence of competitive carriers in the local market (1) demonstrates that, in fact, the barriers to local entry have been effectively lowered and genuine facilities-based competition has emerged, and (2) effectively restrains the incumbent's ability to use its local monopoly to harm competition in the long distance market.

Neither of these requirements has been met in Oklahoma. Indeed, not one competitive carrier is currently providing local exchange service predominantly over network facilities that it owns. Because there is only de minimis facilities-based competition in Oklahoma, SWBT cannot meet the requirements of Section 271.

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[14] The public policy reasons for insisting on a viable, independent alternative to SWBT as a prerequisite to Section 271(c)(1)(A) approval specifically and Section 271 approval more generally are discussed in the testimony of Edward K. Phelan submitted on behalf of Sprint in this proceeding ("Phelan Testimony").

1. The Facilities-Based Competitor Should Own its Own Facilities in Order to Satisfy the Requirements of Section 271(c)(1)(A).

Section 271(c)(1)(A) is satisfied only where one or more competitive LECs offer service to both residential and business subscribers either exclusively or predominantly over facilities that they own. This is clearly the most natural and logical reading of the phrase "over their own telephone exchange service facilities."

There is no basis for SWBT's contention that unbundled network elements obtained from the incumbent should be counted as a CLEC's "own" facilities.[15] Under this strained interpretation, a carrier that provides service exclusively over leased elements or predominantly over leased elements in combination with resold services would meet the Section 271(c)(1)(A) standard. In other words, SWBT would have the Commission believe that a carrier with no independent network facilities whatsoever should qualify as a "facilities-based" carrier. This makes no sense.

First, there is no support in the language of the provision for the view advanced by SWBT. Section 271(c)(1)(A) does not even mention leasing of unbundled elements. As demonstrated by Sections 251(c)(3) and 252(d)(1), Congress was fully capable of referring explicitly to leasehold arrangements when it chose to do so.[16]

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[15] See SWBT Brief, FN 8, p. 10.

[16] It is just as possible, indeed more likely, that Congress understood both the need for enabling competitors to buy unbundled elements and the fact that a carrier providing service predominantly over unbundled elements cannot provide the level of local competition needed to justify interLATA relief.

Moreover, the legislative history is replete with indications that Congress intended that only carriers with their own independent facilities would satisfy the requirements of Section 271(c)(1)(A). For example, the Conference Committee Report states as follows:

> This conference agreement recognizes that it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant. Some facilities and capabilities (e.g., central office switching) will likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251. Nonetheless, the conference agreement includes the "predominantly over their own telephone exchange service facilities" requirement to ensure a competitor offering service exclusively through the resale of the BOC's telephone exchange service does not qualify, and that an unaffiliated competing provider is present in the market.[17]

As this statement demonstrates, Congress allowed a carrier providing services "predominantly" over its own independent facilities to qualify under Section 271(c)(1)(A) solely because it thought it unlikely that there would be any facilities-based competitors with "exclusively" their own facilities in the market. The import is that a carrier qualifying as facilities-based would under any circumstances have substantial independent facilities. If this were not Congress' intent, there would have been no need even to discuss the likely existence of "redundant" networks that may need to lease "some" of the incumbent's network in describing the purpose of Section 271(c)(1)(A).

Moreover, Congress' concern with the prospects of local competition in its explanation of the meaning of Section 271(c)(1)(A) again shows its intent that facilities-based carriers would own distinct physical facilities. The Conference Report discusses at length the "meaningful facilities-based competition" made possible solely by the fact

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[17] Conference Report at 148.

that "cable services are available to more than 96 percent of United States homes."[18] As the Conference Report concludes, "[s]ome of the forays of the cable companies into the field of local telephony therefore hold the promise of providing the sort of local residential competition that has consistently been contemplated."[19]

There are further indications of Congress' expectation that facilities-based carriers would provide service over independent upgraded cable plant. The House Commerce Committee reasoned that, because the cable industry "has wired 95% of the local residences in the United States[, it] thus has a network which could lead to meaningful competition." Further, Representative Hastert (R-IL), a senior Member of the House Commerce Committee, described a facilities-based competitor as "a competitor with its own equipment in place."[20] Another senior member of the House Commerce Committee described elements "owned by the competing provider."[21]

In addition to the obvious weakness in its legal argument, SWBT's approach would be extremely bad policy. This issue is explained more fully in Mr. Phelan's Testimony.[22] Suffice it to say, however, that Congress was well aware that pure resale offers local subscribers, local competitors and long distance carriers virtually no protection against the

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18 Id.

19 Id. (emphasis added).

20 142 Cong. Rec. H1152 (daily ed. Feb. 1, 1996) (emphasis added).

21 141 Cong. Rec. E1699 (daily ed. Aug. 11, 1995) (comments of Rep. Tauzin (R-LA) regarding the meaning of "predominantly over their own telephone exchange service facilities") (emphasis added).

22 See Phelan Testimony at 5, 12-17.

abuses of BOC monopoly power.[23] Moreover, leasing of unbundled elements offers little more protection than pure resale of the BOC's end user services. A lessor under Section 251 does not in any meaningful sense "control" the element it leases; that control remains within the exclusive control of the incumbent LEC. Under either arrangement, the bottleneck facilities remain, and the BOC retains full control over them. This cannot be what Congress intended.

D. The Definition of the Phrase "Predominantly Over Their Own Telephone Exchange Facilities," as That Phrase is Used in Section 271(c)(1)(A).

Sprint believes that to give full import to the term "predominantly" as used in Section 271(c)(1)(A), the Commission must consider the term both qualitatively and quantitatively. As a quantitative matter, the word should be given its common meaning, that is, "having ascendancy, influence, or authority over others; superior; dominating;

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[23] For example, the explanation given by the United States Department of Justice of the limits of resale in the context of SWBT's 1995 request to receive limited in-region interLATA relief was part of the legislative record:

> Resale competition is not a replacement for facilities-based competition . . . It brings competition only to the marketing of local exchange services, and it requires extensive regulations to ensure that the prices, terms and conditions under which SWBT offers the underlying service make resale meaningfully available.

Inserted into the record by Senator Byrd. 141 Cong. Rec. S5969 (daily ed. May 2, 1995).

controlling."[24] At a minimum, this means substantially more than 50%, as measured, e.g., by investment.[25]

More significantly, however, the term must be understood to describe a requirement that encompasses the relative competitive significance of the interconnector's network facilities. Independent back-office operations, for example, are important, but they do not by any means represent the undoing of the bottleneck which SWBT and other Bell Operating Companies enjoy. As explained above, the phrase "over their own telephone exchange facilities" refers to independent facilities owned by the competitor. The qualifying terms, "exclusively" or "predominantly," must be understood to explicate and emphasize the importance of those facilities, and must therefore include local loop facilities. Thus, the phrase in question should be defined to mean that the competitive carrier provides service to most of its customers in the state over its own facilities independent of any facilities that it may also lease from the incumbent carrier to provide service to fewer customers via resale or unbundled local network elements.

The legislative history of Section 271 supports this conclusion. When the "predominantly" language was added on the floor of the House,[26] a senior Member of the

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[24] Webster's New Twentieth Century Dictionary Unabridged (1979).

[25] The FCC has consistently interpreted the term "predominantly" to mean more than 50%. See e.g., Complaint of WNYC Communications Group Against Time Warner City Cable Group Request for Carriage, 8 FCC Rcd. 3925 at ¶ 4 (1993); Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd. 2965 at ¶¶ 4, 5 (1993). There is no reason to think that these precedents should not be followed in the case of Section 271.

[26] House Commerce Committee Chairman Bliley (R-VA) introduced a manager's "en-bloc" amendment which added the "predominantly" language to the bill. See 141 Cong. Rec. H8445 (daily ed. Aug. 4, 1995) (text of the amendment). The Conference adopted "virtually verbatim" the House provision which became Section 271(c)(1)(A). See Conference Report at 148.

Commerce Committee stated that the provision required a competitor to own "more than 50% of the local loop and switching facilities" it used to provide service.[27] The same Member stated that, to determine the proportion of the network owned by the CLEC, regulators should "consider only the local loop and switching facilities."[28] Congress' repeated references to cable companies as the most likely facilities-based competitors similarly reflects an emphasis on local loop infrastructure in determining whether facilities-based competition exists.

Furthermore, the Conference Report (and Section 271(c)(1)(A) itself) specifically states that carriers providing solely "exchange access" would not meet the requirements of Section 271(c)(1)(A).[29] This statement again shows that Congress expected that facilities-based providers would own their own loops, since competitive access providers must rely on the incumbent LECs' loops to carry switched traffic.

This is the only interpretation of "predominantly" that is consistent with the goal of the Telecommunications Act. Competitors who must rely upon the incumbent to lease facilities to provide service to customers cannot and do not offer a real competitive alternative. Indeed, so long as competitors must or do lease facilities from the incumbent, the incumbent remains the underlying monopoly with all of the opportunity and incentive to harm, if not prevent, competition. The goal is to have local competitors construct and operate genuine facilities alternatives to the incumbent, so that the incumbent's monopoly

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27 141 Cong. Rec. E1699 (daily ed. Aug. 11, 1995) (comments of Rep. Tauzin (R-LA)).

28 Id.

29 See Conference Report at 147-148.

power will be dissipated, and consumers will be able to enjoy the benefits of real choices in service quality, technology and value.

As Sprint has explained above, Section 271(c)(1)(A) requires that a facilities-based carrier must own its own loop facilities, and further that it must use "predominantly" those facilities in providing its local exchange services. Thus, the extent of the competitive carrier's loop facilities will be an important consideration in an assessment of whether the carrier meets the Section 271(c)(1)(A) standard. The competitive carrier's loop facilities should be extensive enough to establish it as a truly independent alternative provider of local telephone service and exchange access service.

E. SWBT Cannot Meet the Requirements of Section 271(c)(1)(A) by Merely Entering Into One or More Interconnection Agreements

Certainly the mere act of entering into an interconnection agreement does not satisfy the statute. The requirements of Section 271(c)(1)(A) ("Track A") are met only when at least one carrier has reached a binding interconnection agreement with SWBT under which access and interconnection services are being provided in a fully functional manner and the interconnecting carrier is providing local exchange service to residential and business customers in Oklahoma either exclusively over its own independent facilities or predominantly over its own independent facilities. Prescinding from any precise characterization of the market as "effectively competitive," the significant point is the requirement that SWBT prove that facilities-based competitors are in fact operational in the local market and that it has fulfilled each of its obligations to enable additional entry and expansion.

This reading is supported by the terms of the statute and its legislative history. Section 271(c)(1)(A) requires that SWBT enter into one or more interconnection agreements specifying the terms and conditions under which SWBT "is providing access and interconnection to its network facilities" (emphasis added). The use of the present tense indicates that Congress intended that a BOC be in the business of providing access and interconnection to operational competitors in order for subsection (c)(1)(A) to be met. Thus, the incumbent must have received and satisfied service requests from the new entrants, and actually be exchanging traffic with them.

The statute is clear that merely offering such services is insufficient under Track A. Throughout Section 271, Congress specifically and carefully distinguished between the active provision of access and interconnection required under Track A and the offering of access and interconnection required under Section 271(c)(1)(B) ("Track B"). For example, each of subsections 271(c)(1)(A), (c)(2)(A)(i)(I), and (d)(3)(A)(i) require that the BOC is providing access and interconnection in order to meet Track A. In contrast, in subsections 271(c)(1)(B), (c)(2)(A)(i)(II) and (d)(3)(A)(ii), all provisions describing the obligations of the BOC pursuant to Track B, the statute states only that the BOC must offer or be offering access and interconnection.

The legislative history of the phrase "is providing" further supports this interpretation. The Conference Report states that "the requirement that the BOC 'is

providing access and interconnection' means that the competitor has implemented the agreement and the competitor is operational."[30] That explanation could not be clearer.

Section 271(c)(1)(A) requires more than the presence of one or more "operational" competitors. To meet the Section 271(c)(1)(A) standard, the competitors must provide "telephone exchange service . . . to residential and business subscribers . . . either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities." In order to be meaningful, the requirement should be read to require that the competitors constitute a genuine, facilities-based alternative to the incumbent for both residential and business users. Without this requirement, regulators cannot be sure that the barriers to entry into those markets have been effectively lowered and that end users and long distance carriers have a true alternative to the BOC for exchange and exchange access services.

This level of market entry may not, indeed probably will not, be achieved at first.[31] It is likely that competitive carriers reaching interconnection agreements will initially provide service, especially in the case of small and medium volume users, substantially through network elements leased from the incumbent or through resale of the incumbent's services. But those new entrants will also have to invest in their own network facilities if they plan to compete over the long run. When that investment reaches the point at which the new entrant is predominantly facilities-based and constitutes a meaningful

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30 S. Rep. No. 230, 104th Cong. 2d Sess. 148 ("Conference Report").

31 This is certainly true if SWBT continues to insist upon filing its application prematurely.